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No. 93-996

In the Supreme Court of the United States

OCTOBER TERM, 1993

IN RE JAMES R. HOLLOWAY, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in reviewing the sufficiency of the evidence supporting petitioner's conviction for criminal contempt, the court of appeals properly considered both the certificate of contempt and portions of the trial record in concluding that petitioner's disobedience of court orders was willful.

2. Whether petitioner was properly held in contempt of court under the summary contempt procedures of Fed. R. Crim. P. 42(a).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 995 F.2d 1080.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. A petition for rehearing was denied on September 24, 1993. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on December 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 8, 1991, petitioner was held in criminal contempt of court during a trial in the United States District Court for the District of Columbia. The district court issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a) that same day. On March 10, 1992, the court sentenced petitioner to pay a $1,000 fine. Pet. App. 2a. The court of appeals affirmed. Pet. App. 1a-46a.

1. Petitioner is an assistant federal public defender. He represented Kelvin Rascoe, who was one of six co-defendants in a prosecution for drug offenses that was tried before Judge Norma Holloway Johnson. During petitioner's direct examination of Officer Darrell Young in the presentation of the defense case, Young testified that he prepared an arrest form (known as a "PD 163") for Rascoe that included a statement of the facts relating to Rascoe's arrest and that said that Rascoe had possessed cocaine base with the intent to distribute it. Young corroborated the earlier testimony of Officer Edward Truesdale, who had stated that, in writing the statement of facts in the PD 163, Young had relied on information provided to him by Truesdale, who was present at the arrest, and Officer Robert Condit. Young also confirmed that he had not witnessed any of the events recited in the PD 163. Pet. App. 2a, 4a-5a.

Petitioner then asked Young a series of questions about the information that was included in the PD 163. Following an objection, the district court ruled the inquiry impermissible because Young had no personal knowledge of any of the information contained in the statement of facts. In response to a subsequent question, Young confirmed the court's understanding by testifying that "I don't have any personal knowledge of

the crime being committed." Pet. App. 4a; 10/8/91 Tr. 70-78.

Immediately after that colloquy, petitioner asked the court for permission to mark for identification a "*Gerstein* affidavit"[1] that was contained in the court's own case files, and that had been sworn by Officer Condit the day after Young completed the PD 163. Petitioner told the court that he wanted Young to compare the *Gerstein* affidavit to the PD 163 and to offer an opinion on whether Condit merely copied the statement of facts from the PD 163 in creating the *Gerstein* affidavit. The court ruled that such testimony was "totally irrelevant." Pet. App. 5a, 17a-18a.

Petitioner argued that he was laying the foundation for a later examination of Condit regarding the source of information for Condit's *Gerstein* affidavit.[2] Pet. App. 18a. The court told petitioner that he must first establish that Young had previously seen the *Gerstein* affidavit. *Id.* at 18a-19a. Petitioner asked the court whether

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[1] A *Gerstein* affidavit is a sworn statement that establishes probable cause to justify restraint after an arrest. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[2] In an earlier ruling, the court barred petitioner from attempting to impeach Truesdale with the contents of Young's PD 163, because Truesdale testified that he had never seen that document before. Pet. App. 5a; 9/30/91 Tr. 49-50. Truesdale had testified that during the execution of a search warrant on a home in northeast Washington, D.C., he saw Rascoe tossing ziplock bags containing white rocks into the air and onto the floor. Pet. App. 5a; 9/30/91 Tr. 21-24, 45-46. In response to petitioner's questions, Truesdale confirmed that the PD 163 Truesdale had prepared on the arrest of a co-defendant did not mention that Truesdale had seen Rascoe tossing the ziplock bags into the air. Pet. App. 5a; 9/30/91 Tr. 55-56. Truesdale stated, however, that he put only "some of the facts" into the co-defendant's PD 163. See 9/30/91 Tr. 51-52.

he could "ask [Young] to compare the two documents," to which the court replied that he could not. *Id.* at 20a. When petitioner asked the court to explain why his question was improper, the court stated that "[i]f this man has never seen that document [the *Gerstein* affidavit] before—and that's why I told you you must ask him if he has seen that document, not just those paragraphs contained on it—then he can't testify to it." *Ibid.* Petitioner asked: "Well, can he look at it now? I mean, can he look at it now and compare it." *Ibid.* The court responded that Young "may not compare it until you have made certain determinations," *i.e.*, whether Young had seen the document before. *Id.* at 20a-21a.

Petitioner proceeded to question Young about the *Gerstein* affidavit, asking Young "Do you know what that document is?" The court interrupted, telling petitioner, "First of all, we must determine if he's ever seen it before." The judge herself asked Young if he had ever seen the affidavit before. After Young said no, the court reminded petitioner of its prior ruling about laying a foundation before questioning Young about the affidavit. Pet. App. 7a, 21a-22a.

Nonetheless, petitioner once again asked Young if he knew what the *Gerstein* affidavit was. The court intervened as before, instructing petitioner, "[i]f he has never seen it before, we are not going to ask him if he knows what it is." Petitioner then asked Young if he had "seen [the document] now? Have you looked at it just now?" When Young said yes, petitioner reiterated his earlier question, "can you now tell us what * * * that document is?". The court sustained the government's objection and warned petitioner that "this is the last time I'm going to tell you the objection is sustained." Petitioner persisted in his inquiry, however, asking Young, "Do you recognize any of the wording set forth in that

document?" Following the government's objection, the district court called petitioner to the bench and held him in summary contempt. Pet. App. 7a, 22a-23a.

Later that day, the court issued a written order and certificate of contempt pursuant to Fed. R. Crim. P. 42(a). Pet. App. 49a-63a. The contempt certificate stated that petitioner had defied "the Court's explicit order not to pursue a particular line of questioning," by "contumaciously persist[ing] in posing questions which the Court had already ruled impermissible." *Id.* at 52a. The court found that the "contempt caused serious and substantial interference and delay in the proceedings * * * and [an] obstruction to the orderly administration of justice."[3] *Ibid.* The court scheduled sentencing to take place following the conclusion of trial. *Id.* at 49a.

On March 10, 1992, after a continuance at petitioner's request, the district court sentenced petitioner to pay a fine of $1,000. The court denied petitioner's motion to vacate the contempt conviction and gave petitioner and his counsel the opportunity to allocute on petitioner's behalf. Pet. App. 2a; Gov't C.A. Br. 21-22.

2. The court of appeals affirmed. The court found the evidence sufficient to sustain petitioner's contempt conviction under 18 U.S.C. 401(3), for "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command." The court first rejected petitioner's claim that the terms of the district court's ruling regarding the permissible scope of questioning on the *Gerstein* affidavit were unclear, finding that the district court judge "had made herself as clear as language permits." Pet. App. 7a. The court noted that petitioner's

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[3] The contempt certificate attached the portion of the trial transcript in which petitioner's contempt had occurred. Pet. App. 50a, 53a-62a.

question whether Young had seen the affidavit "now" established that he understood the court's rulings. *Id.* at 8a.

The court of appeals also concluded that petitioner disobeyed the district court's orders "with culpable intent." Pet. App. 9a. The court stated that petitioner's conduct in the episode for which he was cited for contempt, by itself, "points strongly in the direction of willfulness."[4] *Ibid.* The court found, however, that it did not have to rely on that instance alone, because other instances during the trial in which petitioner had been warned not to defy court orders "render the conclusion that he acted with culpable intent almost inescapable."[5] Pet. App. 9a-12a.

The court of appeals also upheld the district court's use of the summary contempt procedures of Fed. R. Crim. P. 42(a), rather than the notice and hearing procedures of Rule 42(b).[6] The court noted that the district

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[4] The court of appeals explained that petitioner had engaged in a "devious pretense" that he could examine Young based on Condit's *Gerstein* affidavit if Young had seen it in court that day; as the court of appeals explained, that view "would make Judge Johnson's ruling [that Young could not be examined on the document unless he had seen it before] completely meaningless." Pet. App. 9a. Judge Johnson had specifically rejected petitioner's request to have Young examine the document for the first time in court, and compare it to his PD 163. *Id.* at 20a-21a.

[5] The court of appeals reviewed two instances in which petitioner disobeyed the trial court's rulings regarding appropriate questions and one colloquy in which the judge warned petitioner that he would be expected to comply with her orders on pain of contempt. Pet. App. 9a-12a.

[6] The court noted that the district court's determination that summary contempt is necessary to maintain order in the courtroom is reviewed "very deferentially—for abuse of discretion." Pet. App. 13a.

court had repeatedly warned petitioner that "certain lines of questioning were impermissible and also that failure to comply with orders could lead to contempt," yet "[n]one of this worked." Pet. App. 13a. Even in the colloquy that preceded the contempt citation, the court of appeals observed, the district judge had repeatedly attempted to elicit compliance from petitioner by reiterating her rulings and warning petitioner that "his continued inquiries violated the order." *Ibid.* Summary contempt was therefore necessary "to terminate the improper questioning of Young, to deter future intentional violations of her orders, and to vindicate judicial authority to control the courtroom."[7] *Ibid.* Finally, the court of appeals upheld the $1,000 fine. *Id.* at 14a-16a.

Chief Judge Mikva dissented. He concluded that the district court erred in employing summary contempt because petitioner's conduct did not actually obstruct justice. He also argued that the district court's instructions were not sufficiently clear to demonstrate willfulness on petitioner's part in pursuing his line of questioning of Young. In addition, he concluded that the majority should not have relied on conduct that was not mentioned in the contempt certificate to support the finding of contumacious intent, because, in his view, a contempt conviction must rest on the cited conduct alone and, in any event, the other incidents did not justify summary contempt. Pet. App. 27a-46a.

ARGUMENT

1. Petitioner contends (Pet. 7-14) that, in reviewing the sufficiency of the evidence that he acted with culpa-

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[7] The court of appeals also held that the judge was not required to refer the matter to another judge because the misconduct was not of a "personal nature" and the judge had not adopted an "adversary posture" with respect to petitioner. Pet. App. 14a.

ble intent, the court of appeals erroneously relied upon incidents not cited in the district court's contempt certificate. That claim lacks merit.

To constitute a criminal contempt based on disobedience of a court order in violation of 18 U.S.C. 401(3), the contemnor must have willfully violated a clear and reasonably specific order of the court. *United States* v. *NYNEX Corp.*, 8 F.3d 52, 54 (D.C. Cir. 1993). When the trial judge adjudicates the contempt summarily, "[t]he order of contempt shall recite the facts" constituting the contempt. Fed. R. Crim. P. 42(a); see *United States* v. *Schrimsher*, 493 F.2d 842, 845 (5th Cir. 1974); *Tauber* v. *Gordon*, 350 F.2d 843, 845 (3d Cir. 1965) (en banc) (per curiam). If the cited conduct is not contumacious, a reviewing court cannot uphold an order of contempt based on other, uncited conduct in which the contemnor engaged during the trial. See *Eaton* v. *City of Tulsa*, 415 U.S. 697, 698-699 (1974) (per curiam). The court of appeals recognized that principle, see Pet. App. 3a ("the reviewing court may not affirm if the *cited* conduct has not been contumacious"). Petitioner, however, does not claim that the court of appeals upheld his contempt conviction based on the theory that he could have been held in contempt for other, uncited conduct. Rather, petitioner claims that the court of appeals erred in considering uncited episodes during the trial in concluding that the contempt for which petitioner was cited—his disobedience of a specific court order—was committed willfully.

The courts of appeals, however, have routinely considered the entire trial record, not just the contempt certificate alone, in evaluating whether a contemnor's actions were willful or intentional. See, *e.g.*, *United States* v. *Lumumba*, 794 F.2d 806, 810, 811 (2d Cir.), cert. denied, 479 U.S. 855 (1986) ("a court can nevertheless look at the cited conduct in the context of other closely

related behavior in the case to determine if that conduct is in fact contumacious"; conducting an independent "reading of the transcript" to locate evidence of contemnor's intent to disrupt the trial); *Vaughn* v. *City of Flint*, 752 F.2d 1160, 1169 (6th Cir. 1985) (relying on the "total record" in "refut[ing] any inference of a deliberate and intentional effort to show disrespect for the court or to obstruct its proceedings"); *In re Farquhar*, 492 F.2d 561, 564 (D.C. Cir. 1973) (reversing summary contempt conviction for lawyer's tardiness, because "there is no evidence that [the lawyer] was repeatedly unpunctual").[8]

For the court of appeals to consider other instances of conduct before the district judge in evaluating the issue of intent neither violates the due process rights of the contemnor nor amounts to the presentation of new evidence on appeal. See Pet. 11. Rather, it is similar to the review of any conviction with regard to the issue of intent: while the charging instrument must allege the conduct constituting the crime, it need not recite all of the evidence bearing on intent. The sufficiency of the evidence of intent to commit contempt turns, as it does

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[8] As petitioner notes (Pet. 12-13), the court of appeals upheld the contempt conviction in *United States* v. *Lumumba* after a hearing pursuant to Fed. R. Crim. P. 42(b). But the principle for which petitioner contends is that all of the evidence supporting a finding of willfulness must be included in the contempt certificate in order for that document to specify the conduct constituting the contempt. If the court of appeals in *Lumumba* had accepted that principle, it would not have reviewed uncited conduct as bearing on intent, regardless of the procedural posture of the case. Petitioner also suggests (Pet. 13) that the court in *In re Farquhar* was expressing a requirement that the trial judge specifically recite the other evidence supporting the contempt; the *Farquhar* court, however, seems to have conducted its own review of the record for the requisite evidence. 492 F.2d at 564.

with respect to any conviction, on the full record available to the trier of fact. The court of appeals' reference to other episodes that took place during the trial in addressing the question of petitioner's intent was consistent with the requirement of Rule 42(a) that the specific facts of the contempt be recited in the contempt certificate and order.[9]

Petitioner errs (Pet. 10-11) in contending that the decision in this case conflicts with *Eaton* v. *City of Tulsa*, *supra*. In *Eaton*, this Court reversed a defendant's contempt conviction for using street vernacular in court on one occasion. 415 U.S. at 698-670. The Court also held that the state appellate court had erred in concluding that other examples of "discourteous responses," not considered by the trial court, could be invoked to uphold the conviction. *Id.* at 698. The Court explained that the appellate court had denied the defendant due process by affirming the conviction "upon a charge not made." *Id.* at 699. Here, however, the court of appeals did not review

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[9] In any event, the particular episode for which petitioner was cited was itself sufficient to establish that his violation of the court's order was willful. For "[w]hile a lawyer has the right and duty to argue vigorously all points that he believes are properly advanced on behalf of his client, he must obey a direct order of the court, * * * no matter how arbitrary he may believe it to be." *United States* v. *Lumumba*, 794 F.2d at 810. Petitioner clearly and deliberately violated that rule by repeatedly posing questions that the trial court had ruled out of bounds. As the court of appeals stated, petitioner's actions at the time of the cited conduct "point[ ] strongly in the direction of willfulness," Pet. App. 9a, and they are sufficient to support his conviction. See *United States* v. *Maynard*, 933 F.2d 918, 920 (11th Cir. 1991) (sufficiency standard for reviewing a contempt conviction is whether a reasonable trier of fact, construing the contemnor's actions in the light most favorable to the government, could find the defendant guilty beyond a reasonable doubt).

the record for other instances of conduct that might constitute contempt and convict him on "a charge not made." The conviction was affirmed only because the conduct for which the trial court held petitioner in contempt—petitioner's disobedience of the court's rulings on the scope of the examination of Young—was, in fact, contemptuous.

Nor is petitioner correct in asserting (Pet. 10-11) that the decision in this case conflicts with decisions of other courts of appeals. In *Tauber* v. *Gordon*, *supra*, the Third Circuit reversed "a contempt conviction[] based on one specification of conduct that, on review, appears not to have been contemptuous, and a generalized reference without specification to a course of conduct throughout [the] trial." 350 F.2d at 845 n.1. *Tauber* held only that a contempt conviction must "stand or fall on the sufficiency of the specification of wrongdoing upon which it is based." *Ibid.* The court, however, had no occasion to consider the issue presented in this case: whether, when the trial court sufficiently specifies the contemptuous wrongdoing, the appellate court may consider the entire trial record in determining whether the contemnor acted willfully.

Petitioner also suggests (Pet. 10-11) that other cases following the rule of *Eaton* and *Tauber* conflict with the decision in this case. Presumably, petitioner is referring to the cases he cites for the proposition that the facts stated in the certificate of contempt are important. Pet. 9. Those cases, however, did not consider the element of intent; they simply reiterated the requirement that the conduct constituting the contempt must be alleged with specificity. See *United States* v. *Marshall*, 451 F.2d 372, 376 (9th Cir. 1971) (contempt specification deficient because it did not identify the contumacious conduct, but made only "conclusory statements, unsup-

ported by specific references to the record"); *United States* v. *Schrimsher*, 493 F.2d at 845 ("the order [of contempt] does not make clear exactly which of [the attorney's] remarks the court considered contemptuous").[10]

2. Petitioner argues (Pet. 14-19) that the court below erred in upholding his conviction under the summary contempt procedures of Fed. R. Crim. P. 42(a) rather than affording him a hearing under Rule 42(b).

a. Rule 42(a) provides that a criminal contempt "may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Petitioner does not dispute that the judge saw and heard the behavior at issue here and that it was committed in the court's presence. Instead, he argues that the court of appeals "failed to determine whether petitioner actually obstructed the administration of justice," Pet. 14-15, which petitioner asserts is a prerequisite to the use of summary contempt procedures.

The district court found that petitioner's contempt "caused serious and substantial interference and delay in the proceedings * * * and obstruction to the orderly

[10] Petitioner also asserts (Pet. 13 n.5) that *In re Chaplain*, 621 F.2d 1272, 1276 (4th Cir.) (en banc), cert. denied, 449 U.S. 834 (1980), "increases the divergence in the courts of appeals on this issue." He does not claim, however, that *Chaplain* conflicts with the decision here, or that the court of appeals in this case applied the principle endorsed by *Chaplain*. See *Chaplain*, 621 F.2d at 1276 ("where the record reveals a pattern of potentially disruptive conduct preceding a summary conviction, the specification of a single episode [in the contempt order] adequately charges as well the entire course of like antecedent conduct from the time when it was fairly identified to the contemnor as potentially contumacious"). Because *Chaplain* contains no holding on what evidence of *intent* a reviewing court may consider, it is irrelevant to the issue presented here.

administration of justice." Pet. App. 52a. The determination whether to impose summary contempt penalties under Rule 42(a) rests in the discretion of the district court, see *United States* v. *Wilson*, 421 U.S. 309, 316-317 (1975); *In re McDonald*, 819 F.2d 1020, 1024 (11th Cir. 1987) (per curiam); *United States* v. *Moschiano*, 695 F.2d 236, 251-252 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983), and the trial court was within its discretion in finding petitioner's disobedience of the court's ruling to constitute an "actual obstruction of justice." Petitioner ignored the court's authority in front of the jury, delayed the progress of trial by repeatedly asking questions already held improper, and forced the court to engage in repetitious instructions and explanations about petitioner's examination of Young.

Because the district court did not specify which subsection of 18 U.S.C. 401 covered petitioner's contempt, the court of appeals considered that issue as a threshold matter. It concluded that petitioner's conviction was "valid" under 18 U.S.C. 401(3), which covers "[d]isobedience or resistance to [a court's] lawful writ, process, order, rule, decree, or command." Pet. App. 3a. The court therefore stated (*ibid.*) that it "need not address" in this case the applicability of 18 U.S.C. 401(1), which covers "[m]isbehavior of any person in [the court's] presence or so near thereto as to obstruct the administration of justice." In a footnote, the court added that certain cases cited by the dissent, "insofar as they clarify the meaning of the obstruction of justice element of § 401(1), [are] not pertinent to this opinion." Pet. App. 3a n.1.

Based on that footnote, petitioner contends (Pet. 15) that in affirming the district court's use of summary procedures under Fed. R. Crim. P. 42(a), the court of appeals "ignored the question whether petitioner's conduct

obstructed justice." The question whether petitioner's conduct must have obstructed justice to violate 18 U.S.C. 401(3), however, is distinct from the question whether obstruction of justice must be established to justify the use of summary contempt procedures under Rule 42(a). The court of appeals addressed the propriety of invoking the summary procedures of Rule 42(a) in this case in a separate section of its opinion. Pet. App. 12a-14a. In that section, the court began by quoting this Court's statement in *Taylor* v. *Hayes*, 418 U.S. 488, 497 (1974), that when a judge observes a contempt committed in his presence, he has the power to punish it summarily "for the purpose of maintaining order in the courtroom."[11] Pet. App. 13a. On the facts of this case, the court held that the need to maintain order in the courtroom was present:

> Judge Johnson unquestionably was on solid ground in determining that the necessity of preserving order justified use of Rule 42(a). By the time the judge actually held [petitioner] in contempt, she had repeatedly warned him—without any apparent effect—to heed her rulings on pain of potential contempt. In the line of questioning that produced the contempt conviction, she at least three times reiterated her order about the threshold showing required to inquire about the *Gerstein* affidavit, and warned [petitioner] in open court that his continued inquiries violated the order. *By the time Judge Johnson moved under Rule 42(a), she had a compelling need to terminate the improper questioning of Young, to deter future*

[11] The court of appeals also recognized that "only [t]he least possible power adequate to the end proposed should be used in contempt cases." Pet. App. 13a, quoting *United States* v. *Wilson*, 421 U.S. 309, 319 (1975) (internal quotation marks omitted).

intentional violations of her orders, and to vindicate judicial authority to control the courtroom.

Pet. App. 13a. (emphasis added).

That discussion indicates that the court of appeals held that summary contempt was warranted here because petitioner's conduct constituted an actual disruption of judicial proceedings. The court determined that the vindication of the district court's authority and the orderly continuation of the trial required immediate action. That is the essence of the requirement that summary contempt not be imposed absent "an actual obstruction of justice." *In re McConnell*, 370 U.S. 230, 234 (1962); *Ex parte Hudgings*, 249 U.S. 378, 383 (1919); *Ex parte Terry*, 128 U.S. 289, 303, 307 (1888); see *Wilson*, 421 U.S. at 316 (footnote omitted) ("The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court.").

Petitioner contends (Pet. 15) that the court of appeals' decision conflicts with decisions of this and other courts.[12] That claim is premised on the view that the court of appeals did not require any showing of interference with or obstruction of judicial proceedings as a prerequisite to upholding the use of summary contempt. Because the court of appeals found such an interference or obstruction in this case, petitioner's claim of a con-

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[12] See Pet. 15, citing, *inter alia*, *In re McConnell*, *supra*; *Taberer* v. *Armstrong World Industries, Inc.*, 954 F.2d 888, 900-901 (3d Cir. 1992); *United States* v. *Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987); *Vaughn* v. *City of Flint*, 752 F.2d at 1166; *Gordon* v. *United States*, 592 F.2d 1215, 1217 (1st Cir.), cert. denied, 441 U.S. 912 (1979).

flict with decisions that have required a showing of interference with or obstruction of judicial proceedings does not call for this Court's review.

b. Petitioner also argues (Pet. 16-19) that the district court improperly employed the summary procedures of Rule 42(a) when it did not sentence petitioner until five months after it held him in contempt.

The district court issued a written order and certificate of contempt on the same day it cited petitioner for contempt. Although the court did not sentence petitioner until after the trial, the adjudication of contempt occurred immediately. That immediate adjudication fulfilled the goals of summary punishment, because it vindicated the court's authority, protected the processes of orderly trial, and ensured that petitioner understood his obligation to comply with court orders in further proceedings. As the court of appeals found, the necessity of preserving courtroom order justified the use of Rule 42(a) here.[13] Pet. App. 13a-14a.

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[13] Amici Public Defender Service, et al., argue (Br. 6-11) that the deferral of sentencing might have impaired the vigor of petitioner's defense of his client, because of the lawyer's fear of the sentence to be imposed at the end of the trial. Amici thus suggest that deferral creates an impermissible conflict of interest between the defendant and his lawyer. But if sentence had been imposed immediately, the attorney would, if anything, have suffered a greater "chill" by receiving the full sting of his punishment. Moreover, the trial judge always retains the power to reduce a contempt sentence after the trial. See *Groppi* v. *Leslie*, 404 U.S. 496, 506 n.11 (1972) ("Modification of contempt penalties is common where the contemnor apologizes or presents matter in mitigation."). If amici's claim of a "conflict of interest" were accepted, any defense counsel who was held in summary contempt could be said to labor under a conflict, on the theory that he would become a less vigorous advocate in the hope of reducing his own punishment for contempt.

Contrary to petitioner's contention (Pet. 17-19), the court of appeals' holding does not conflict with *Taylor* v. *Hayes*, 418 U.S. 488 (1974), or *United States* v. *Lumumba*, 741 F.2d 12 (2d Cir. 1984). In those cases, the trial judge deferred both sentencing *and* final adjudication of the contempt charge until after trial. *Taylor*, 418 U.S. at 498-499; *Lumumba*, 741 F.2d at 17; see *United States* v. *Lumumba*, 794 F.2d at 808. Here, in contrast, the adjudication of contempt was immediate, and only sentencing was delayed. Because the immediate adjudication of contempt vindicated the court's authority and enabled the court to proceed with the trial, the reasons that the deferred adjudication of summary contempt troubled the courts in *Taylor* and *Lumumba* are not present in this case.[14]

[14] Petitioner also relies on (Pet. 17) the decisions in *United States* v. *Stratton*, 779 F.2d 820, 836 (2d Cir. 1985) (upholding a short delay in the imposition of a contempt sentence), and *United States* v. *Dowdy*, 960 F.2d 78, 82 (8th Cir. 1992) (upholding the suspension of execution of a contempt sentence until after trial). Both of those decisions upheld the use of summary contempt, and neither conflicts with the decision in this case. See also *In re McDonald*, 819 F.2d at 1025 (upholding summary adjudication of contempt, where court delayed imposition of punishment until after jury returned its verdict; "especially where the offender is an attorney representing a client on trial, summary punishment may be postponed until the conclusion of the proceedings").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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